

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CARLA LARSEN,)
) No. CV 07-1481-HU
Plaintiff,)
)
v.)
) OPINION AND ORDER
MICHAEL J. ASTRUE,)
)
Commissioner, Social)
Security Administration,)
)
Defendant.)
)

David Lowry
9900 S.W. Greenburg Road, Suite 235
Portland, Oregon 97223
Attorney for plaintiff

Karin J. Immergut
United States Attorney
District of Oregon
Britannia Hobbs
Assistant United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, Oregon 97204
Nancy Mishalanie
Special Assistant United States Attorney
Office of the General Counsel
Social Security Administration
701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104
Attorneys for defendant

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1 HUBEL, Magistrate Judge:

2 The matter before the court is defendant's motion to dismiss
3 this case for lack of subject matter jurisdiction. The motion is
4 granted.

5 **Procedural Background**

6 Plaintiff Carla Larsen seeks judicial review of the denial of
7 her claim for disability insurance benefits under Title II of the
8 Social Security Act, 42 U.S.C. §§ 401-433. The Commissioner asserts
9 that the court has no subject matter jurisdiction because Larsen
10 has failed to exhaust her administrative remedies.

11 Larsen applied for disability insurance benefits on September
12 20, 2006. Declaration of Errol B. Sperling. The application was
13 denied initially on October 7, 2006, and upon reconsideration on
14 December 12, 2006. Id. On February 28, 2007, Larsen filed a request
15 for hearing. Id. On April 26, 2007, the ALJ dismissed Larsen's
16 request for hearing for failure to request the hearing within 60
17 days and failure to establish good cause for an untimely request.
18 Id.; Exhibit 1. Larsen requested review of the dismissal through
19 counsel on May 17, 2007. Id. at Exhibit 2. On August 28, 2007, the
20 Appeals Council denied the Request for Review, ruling that the
21 additional evidence provided by Larsen did not provide a basis for
22 reversing the ALJ's decision. Id. at Exhibit 3.

23 **Discussion**

24 The United States is immune from suit unless it consents to
25 waive its sovereign immunity. Lehman v. Nakshian, 453 U.S. 156, 160
26 (1981). As courts of limited jurisdiction, federal courts may not
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1 entertain an action against the federal government without its
2 consent. United States v. Mitchell, 445 U.S. 535, 538 (1980). Only
3 Congress can abrogate sovereign immunity and subject the federal
4 government to suit. Tucson Airport Authority v. General Dynamics,
5 136 F.3d 641, 644 (9th Cir. 1998).

6 The doctrine of sovereign immunity applies to federal agencies
7 and to federal employees acting within their official capacities.
8 South Delta Water Agency v. Dept of the Interior, 767 F.2d 531, 536
9 (9th Cir. 1985). Any waiver of immunity must be "unequivocally
10 expressed," and any limitations and conditions upon the waiver
11 "must be strictly observed and exceptions thereto are not to be
12 implied." Lehman, 453 U.S. at 160-161; see also Tucson Airport
13 Authority, 136 F.3d at 644.

14 The statute granting jurisdiction to district courts to review
15 decisions of the Commissioner is 42 U.S.C. § 405(g), which provides
16 as follows:

17 Any individual, after any final decision of the
18 Commissioner of Social Security made after a hearing to
19 which he was a party, irrespective of the amount in
20 controversy, may obtain a review of such decision by a
21 civil action commenced within sixty days after the
22 mailing to him of notice of such decision or within such
23 further time as the Commissioner of Social Security may
24 allow.

25 (Emphasis added). See also Califano v. Sanders, 430 U.S. 99, 108
26 (1977) [Section 405(g) "limits judicial review to a particular type
27 of agency action, a final decision of the [Commissioner] made after
28 a hearing;" decision by the Commissioner not to reopen a benefits
claim "may be made without a hearing," and such a decision, though
binding on the parties, does not constitute a reviewable decision

under 405(g)]. (Emphasis added).¹

In Matlock v. Sullivan, 908 F.2d 492 (9th Cir. 1990), the court held that, "like the majority of other circuits which have considered the issue,"² under the Supreme Court's decision in Sanders, Appeals Council decisions to refrain from considering untimely petitions for review are not final decisions subject to review in federal court. 908 F.2d at 493. In Hoye v. Sullivan, 985 F.2d 990 (9th Cir. 1992), the court held that in the absence of a hearing, the court had no subject matter jurisdiction over a claim that the ALJ arbitrarily and capriciously dismissed his request for a hearing. 985 F.2d at 992.

Defendant's motion to dismiss the action for lack of subject matter jurisdiction (doc. # 8) is GRANTED.

¹ Section 405(h) of Title 42 states:

No findings of fact or decision of the [Commissioner] shall be reviewed by any person, tribunal or government agency except as herein provided.

² Several federal appellate courts have held that absent a colorable constitutional claim, dismissals of hearing requests or requests for Appeals Council review as untimely are unreviewable under § 405(g). See, e.g., Hilmes v. Secretary, 983 F.2d 67, 70 (6th Cir. 1993) (untimely hearing request); Penner v. Schweiker, 701 F.2d 256, 260 (3d Cir. 1983) (untimely hearing request); Bacon v. Sullivan, 969 F.2d 1517 (3d Cir. 1992) (untimely appeal to Appeals Council); Harper v. Bowen, 813 F.2d 737 (5th Cir. 1987) (denial of extension of time to seek Appeals Council review of ALJ decision); Brandyburg v. Sullivan, 959 F.2d 555 (5th Cir. 1992) (dismissal of hearing request based on claimant's failure to attend scheduled hearing); Watters v. Harris, 656 F.2d 234, 239 n. 10 (7th Cir. 1980) (Secretary's denial of petition seeking more time in which to file initial request for hearing).

1 IT IS SO ORDERED.

2 Dated this 2nd day of April, 2008.

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4 /s/ Dennis James Hubel
5 Dennis James Hubel
6 United States Magistrate Judge
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